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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92060308
Party	Plaintiff SFM, LLC
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Date	09/03/2015
Attachments	SFM's Response to Corcamore's August 14, 2015 Filing.pdf(15648 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

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In the Matter of Registration No. 3,708,053; Mark: SPROUT;  
Date of Registration: November 10, 2009

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SFM, LLC

Petitioner,

v.

Cancellation No: 92060308

CORCAMORE, LLC.

Respondent.

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**SFM'S RESPONSE TO CORCAMORE'S AUGUST 14, 2015 FILING**

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Corcamore's most recent request for relief is procedurally improper. Additionally, all of the information contained in SFM's response to Corcamore's Rule 11 motion was relevant, properly included, and not privileged. SFM therefore respectfully requests that the Board deny Corcamore's motion.

Enforcement of Trademark Rule 2.127(d)

On August 14, 2015, Corcamore filed a "Motion of Respondent-Registrant to Enforce Rule 2.127(d) Order." (Dkt. 23). In the motion, Corcamore improperly asks the Board to strike portions of SFM's response to Corcamore's Rule 11 motion "which are 'not[] germane to the motion[s]' before the Board, pursuant to 2.127(d)." Rule 2.127(d) requires that "no party file any paper which is not germane to the motion except as otherwise specified in the Board's suspension order." 37 C.F.R. 2.127(d). Corcamore's motion is non-sensical. The Board suspended the proceeding for consideration of Corcamore's converted motion for summary

judgment on April 30, 2015. Since that time, Corcamore has filed four motions requesting affirmative relief: a request for reconsideration of the Board's denial of its motion to dismiss (Dkt. 15), a motion for Rule 11 sanctions (Dkt. 20), a motion to defer consideration of its request for sanctions due to its failure to observe the safe-harbor provision of Rule 11 (Dkt. 21), and now a motion to enforce Rule 2.127(d) (Dkt. 23). SFM, conversely, has not filed any affirmative motions in this proceeding, and has complied with the Board's suspension of the proceedings by only responding to Corcamore's numerous filings (Dkt. 16, 17, 19, 22). Indeed, SFM's response to Corcamore's Rule 11 motion directly rebuts Corcamore's arguments and, in its defense, includes facts and arguments supporting its opposition to Corcamore's motion for sanctions and, specifically, to show its frivolity. As a result, SFM's response to Corcamore's Rule 11 motion is directly germane to the Rule 11 motion, to which Corcamore opened the door. If SFM's response is not germane, then neither is Corcamore's Rule 11 motion. SFM has been, and will continue to be, in compliance with the Board's Rule 2.127(d) order, and therefore would not oppose its enforcement.

#### Corcamore's Motion to Strike is Improper and Unsupported

SFM does, however, oppose Corcamore's request to strike portions of SFM's response to Corcamore's Rule 11 motion for at least three reasons.

First, the request to strike is procedurally improper:

**Subject to the provisions of Fed. R. Civ. P. 11, a party is entitled to offer in its brief any argument it feels will be to its advantage. Accordingly, when a moving brief, an opposition brief, or a reply brief on a motion has been regularly filed, the Board generally will not strike the brief, or any portion thereof, upon motion by an adverse party that simply objects to the contents thereof.** Rather, any objections which an adverse party may have to the contents of such a brief will be considered by the Board in its determination of the original motion, and any

portions of the brief that are found by the Board to be improper will be disregarded.

T.B.M.P. § 517 (emphasis added). As a result, in accordance with the TTAB's procedural rules, SFM respectfully requests the Board deny Corcamore's request.

Second, Corcamore's May 5, 2015 fax threatening SFM with a "procedural Rubicon" was included in SFM's response to showcase the frivolous nature of Corcamore's motion, not to "prove or disprove the validity or amount of a disputed claim or to impeach by prior inconsistent statement or a contradiction" as prohibited by Federal Rule of Evidence 408. Further, the communication was not private or confidential. SFM's inclusion of Corcamore's promise of a "procedural Rubicon" was relevant to show that Corcamore has employed a strategy of vexatious litigation, that its Rule 11 motion was the most recent example of that strategy in action, and that therefore its Rule 11 motion was frivolous. The inclusion of the threat was proper under Federal Rule of Evidence 408. *Uforma/Shelby Business Forms, Inc. v. National Labor Relations Board*, 111 F.3d. 1284, 1293-94 (6th Cir. 1997) (Rule 408 did not exclude statements made during settlement communications which were submitted "in order to demonstrate that, regardless of the legitimacy of the grievance, the petitioner threatened, and subsequently retaliated against, the union for pursuing it"). Rule 408 also clarifies that "[t]he court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." SFM did not reference the Corcamore letter to prove the validity of a dispute, but for another purpose: here, to show the frivolousness of Corcamore's motion. SFM's citation to the letter to support its assertion that the Rule 11 motion was frivolous was thus entirely proper under the Rules. Accordingly, SFM respectfully requests the Board deny Corcamore's request.

Finally, Corcamore's invocation of the Standards for Professional Conduct within the Seventh Federal Judicial Circuit is unavailing. Corcamore's threatening letter was not marked confidential, and did not contain a good faith settlement offer. Given the letter's inappropriate nature, and that SFM is not offering it to prove liability, SFM was entitled to make the Board aware of its existence. *See United States v. Havert*, 40 F.3d 197, 199-200 (7th Cir. 1994) (The Seventh Circuit, citing to the Advisory Committee Comment to Rule 408, has held that Rule 408 does not require exclusion of evidence otherwise discoverable merely because it was presented in the course of compromise negotiations and when it is offered for another purpose). Given that the material Corcamore seeks to strike from SFM's response is relevant and not privileged, SFM requests that Corcamore's motion be denied.

### **CONCLUSION**

For all of the above reasons, SFM requests that the Board deny Respondent's motion.

Dated: September 3, 2015

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**CERTIFICATE OF SERVICE**

I certify that on September 3, 2015, a true and correct copy of the foregoing was served via U.S. Mail upon the following:

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/s/ Christian G. Stahl

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